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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of

Amendment of Section 73.202(b),

Table of Allotments,

FM Broadcast Stations

(Arlington, The Dalles, Moro, Fossil, Astoria,

Gladstone, Tillamook, Springfield-Eugene,

Coos Bay, Manzanita and Hermiston, Oregon

and Covington, Trout Lake, Shoreline, Bellingham,

Forks, Hoquiam, Aberdeen, Walla Walla, Kent,

College Place, Long Beach and Ilwaco, Washington)

MB Docket No. 02-136

To: The Commission

ORIGINAL

APPLICATION FOR REVIEW

Matthew H. McCormick, Esq.
Reddy, Begley & McCormick, LLP
1156 15th Street, N.W., Suite 610
Washington, D.C. 20005-1770
(202) 659-5700

Counsel for
TRIPLE BOGEY, LLC, MCC RADIO, LLC
and KDUX ACQUISITION, LLC

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Summary

Triple Bogey, LLC; MCC Radio, LLC, and KDUX Acquisition, LLC (collectively “Triple Bogey”) seek reversal of the *Report and Order* released in this proceeding on July 9, 2004 (DA 04-2054). Through the *Report and Order*, the Commission’s staff (a) dismissed Triple Bogey’s allotment proposal to, *inter alia*, move Station KDUX-FM from Channel 284C2 at Aberdeen, Washington, to Channel 283C2 at Shoreline, Washington, as that community’s first local service and (b) granted the conflicting proposal of Mid-Columbia Broadcasting, Inc. and First Broadcasting Company, L.P. (collectively “Joint Petitioners”) to, *inter alia*, move Station KMCQ from Channel 283C at The Dalles, Oregon, to Channel 283C3 at Covington, Washington. (Other aspects of the *Report and Order* are not material to the questions Triple Bogey presents.) The staff should not have dismissed Triple Bogey’s proposal or granted the Joint Petitioners’.

First, the Commission should reject the Joint Petitioners’ revival of its original proposal to move KMCQ to Covington, Washington, which it abandoned nearly two years previously in favor of a counterproposal to move KMCQ instead to Kent, Washington. The Joint Petitioners, in essence, treated the Kent and Covington proposals as alternatives between which they could switch at any time. But the Commission has previously made clear that it will not entertained alternative allotment proposals offered by the same party. Furthermore, on the comment deadline, the Joint Petitioners failed to file a continuing expression of interest with respect to their then-abandoned Covington proposal. That failure should be deemed fatal.

Second, the proposed location of KMCQ from The Dalles to Covington, which is located in the Seattle Urbanized Area, would deprive approximately 2,000 persons their only full-time radio reception service and another 1,800 persons of one of just two radio reception services available.

That service would be restored only when and if stations on five vacant allotments, including three allotments proposed in this proceeding, begin operation. The withdrawal of existing service to such a large underserved population is contrary to the public interest and should have resulted in the denial of the Joint Petitioners' proposal.

Turning to Triple Bogey's proposal, the *Report and Order* dismissed that plan solely because it potentially would require Station KAFE(FM), Bellingham, Washington, to operate with a directional antenna in order to protect two vacant Canadian allotments. The licensee of KAFE, Saga Broadcasting Corp., objects to being required to use a directional antenna, even though it previously had consented to use of such antenna to facilitate the now-abandoned Joint Petitioners' counterproposal to move KMCQ to Kent, Washington. Under the narrow circumstances presented, the Commission should require KAFE to use a directional antenna in order to accommodate the Shoreline proposal. First, the use of contour protection methods, including employment of directional antennas, to protect Canadian allocations is commonplace and specifically authorized under the U.S.-Canada treaty. The use of a directional antenna in this case would result in no reduction in the area or population within the United States covered by KAFE's 60 dBu or 70 dBu contours. The only area that would lose service from KAFE would be in Canada and, under the U.S.-Canada treaty, KAFE is entitled to protection of coverage only in its own country. When, as in this case, adoption of a proposal would bring a first local service to a large community, the unwillingness of the U.S. station near the border to employ a directional antenna to protect Canadian allotments should not be fatal where use of that directional antenna will not reduce the station's protected coverage in the United States. Under these narrow, if not unique, circumstances, Triple Bogey's proposal should be adopted.

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(Arlington, The Dalles, Moro, Fossil, Astoria,)	
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Forks, Hoquiam, Aberdeen, Walla Walla, Kent,)	
College Place, Long Beach and Ilwaco, Washington))	

To: The Commission

APPLICATION FOR REVIEW

Triple Bogey, LLC; MCC Radio, LLC, and KDUX Acquisition, LLC (collectively "Triple Bogey") herein seek Commission review of the *Report and Order* released in the above-captioned proceeding on July 9, 2004 (DA 04-2054).¹

I. Preliminary Statement

Pursuant to Section 1.115 of the Commission's Rules, Triple Bogey seeks Commission review of the staff's rulings, set forth in the *Report and Order*, dismissing Triple Bogey's allotment proposal and granting the conflicting allotment proposal of Mid-Columbia Broadcasting, Inc. and First Broadcasting Company, L.P. ("FBC") (collectively "Joint Petitioners").

¹ A summary of the *Report and Order* was published in the *Federal Register* on July 21, 2004. 69 Fed. Reg. 43534. Publication of that summary constitutes public notice of the *Report and Order*. 47 C.F.R. § 1.4(b)(1). This application for review is being filed within 30 days of *Federal Register* publication and thus is timely. 47 C.F.R. § 1.115(d).

In certain respects the staff's rulings are in conflict with Commission precedent and established Commission policy. In other respects, the case involves questions of law and policy that have not previously been resolved by the Commission. Through this Application for Review, Triple Bogey requests that the Commission reinstate and grant Triple Bogey's allotment proposal, and dismiss or deny the Joint Petitioners' proposal.²

II. Issues Presented

- A. Whether a rule making proponent that (a) files a counterproposal to its own initial proposal and (b) then, after many months of active prosecution, withdraws its counterproposal, should be allowed, in an effort to avoid compliance with a Commission order and over the objection of other parties, to reinstate its abandoned initial proposal.
- B. Whether it is contrary to the public interest to adopt an allotment proposal that would result in the loss of the only radio service currently available to approximately 2,000 persons and the loss of one of only two radio services currently available to approximately another 1,800 persons, where such service only would be restored if and when new stations began operation on five vacant allotments, including three allotments proposed in this proceeding.
- C. Whether an otherwise superior allotment proposal should be dismissed because it might require another station, without the licensee's consent, to employ a directional antenna to protect Canadian allotments, where use of the directional antenna would not result in any reduction of the area or population the station serves within the United States.

III. Background

On October 29, 2001, the Joint Petitioners filed a petition seeking to change the allotment of Station KMCQ(FM) from Channel 283C at The Dalles, Oregon, to Channel 283C3 at Covington, Washington. The Dalles is located on the Columbia River, approximately 84 miles east of Portland,

² Triple Bogey does not seek review of the Commission's action in the *Report and Order* granting the allotment proposal of New Northwest Broadcasters LLC ("New Northwest") to relocate Station KAST from Channel 225C1 at Astoria, Oregon, to Channel 226C3 at Gladstone, Oregon, or any of the five other channel substitutions to accommodate the Gladstone allotment.

Oregon. Covington is located within the Seattle Urbanized Area. Because reallocation of KMCQ to Covington would create unserved and underserved areas, the Joint Petitioners also proposed allotment of new vacant channels at Moro, Oregon (Channel 283C2), Arlington, Oregon (Channel 261C2) and Trout Lake, Washington (Channel 226A). Joint Petitioners' Petition for Rule Making (hereinafter "Covington Proposal") at p. 9.³

On June 7, 2002, the Commission's staff released the *Notice of Proposed Rule Making*, 17 FCC Rcd 10678 (Media Bur. 2002) ("*NPRM*"), in this proceeding. The *NPRM* set July 29, 2002, as the deadline for comments and counterproposals.

On that date, Triple Bogey filed its counterproposal to substitute Channel 283C2 for Channel 284C2 at Aberdeen, Washington; reallocate Channel 283C2 to Shoreline, Washington; and modify the license of Station KDUX-FM to specify operation on Channel 283C2 at Shoreline. To accommodate the Shoreline allotment, Triple Bogey proposed substitution of Channel 281C for Channel 282C at Bellingham, Washington, and modification of the license of Station KAFE, Bellingham, to specify operation on the new channel. As discussed in greater detail below, operating on Channel 281C, Station KAFE would be fully spaced to all other United States stations, but would be short-spaced to two vacant British Columbia allotments, Channel 280A at Powell River and Channel 281A at Bralorne. Accordingly, Triple Bogey sought to invoke the "special negotiated short-spacing" process established in the treaty with Canada.⁴ Operation of KAFE on Channel 281C

³ The proposed allotment of Channel 226A at Trout Lake conflicted with New Northwest's proposal to allot Channel 226C3 at Gladstone, Oregon. New Northwest proposed an alternate allotment at Trout Lake, Channel 236A. That alternate allotment was adopted in the *Report and Order*. Triple Bogey has no objection to allotment of Channel 236A at Trout Lake.

⁴ The treaty is formally referred to as *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels Under the Agreement Between the Government of the United States of America and the Government of Canada Relating to the FM Broadcasting Service* (February 25, 1991, amended July 9, 1997) (hereinafter "*Working Arrangement*").

would have required, through use of a readily available directional antenna, a slight reduction in radiation toward the two Canadian allotments in question. Effectuation of the proposal would have entailed **no change** in the area and population in the United States covered by the KAFE 60 dBu or 70 dBu contours. *See* Triple Bogey's Comments and Counterproposal (hereinafter "Shoreline Proposal") at pp. 17-20 & Exhibit A at pp. 11-21.⁵

Triple Bogey pointed out that Shoreline had a substantially larger population, as of the 2000 Census, than Covington (53,025 versus 13,783), and that adoption of the Shoreline Proposal would provide a first aural service to 558 persons in an aggregate area of 1,171 square kilometers and second aural service to 1,971 persons in an aggregate area of 2,324 square kilometers. *Id.* at pp. 4, 22-24.

Because Shoreline is located in the northern portion of the Seattle Urbanized Area, Triple Bogey demonstrated that, under the familiar *Tuck* criteria,⁶ Shoreline is an independent community, well-deserving of its own local transmission service. *Id.* at pp. 6-15 & Exhibits B through Z.

On the counterproposal deadline, the Joint Petitioners, joined by Saga Broadcasting Corp. ("Saga"), licensee of KAFE, filed a counterproposal to the Joint Petitioners' own Covington Proposal. Specifically, instead of moving KMCQ to Channel 283C3 at Covington, they proposed reallocation of the station to Channel 283C2 at Kent, Washington. *See* Joint Petitioners' and Saga's

⁵ Also to accommodate the Shoreline allotment, Triple Bogey proposed substitution of Channel 240A for Channel 280A at Forks, Washington, and modification of the license of Station KLLM, Forks, to specify operation on the new channel. Additionally, Triple Bogey requested substitution of Channel 284C2 for Channel 237C3 at Hoquiam, Washington, and modification of the license of Station KXXK, Hoquiam, Washington, to specify operation on the upgraded channel and the allotment of new vacant channels at Aberdeen, Washington (Channel 237C3); Trout Lake, Washington (Channel 226A); Arlington, Oregon (Channel 261C2); Fossil, Oregon (Channel 285A), and Moro, Oregon (Channel 300A). Shoreline Proposal at pp. 2-3.

⁶ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

Comments and Amended Proposal, filed July 29, 2002 (hereinafter “Kent Proposal”). To accommodate that allotment, the Joint Petitioners and Saga, like Triple Bogey, proposed that KAFE switch from Channel 282C to Channel 281C and, if necessary, operate with a directional antenna to protect the Powell River and Bralorne allotments.⁷ The Joint Petitioners claimed that recent changes in the “regulatory landscape” in Canada led to Saga’s cooperation and justified the filing of a counterproposal to their own initial proposal. Kent Proposal at 2.

Specifically, the Joint Petitioners requested that the Commission ask the Canadian government to (a) substitute an available fully spaced channel at Powell River and (b) waive the Bralorne short-spacing on the grounds that, due to a significant terrain blockage, no actual interference would occur to a facility operating on the Bralorne allotment. Kent Proposal at p. 11-12. But the Kent Proposal further stated that should the Commission decide not to send the reallocation and waiver proposals to the Canadian government, the Joint Petitioners would protect the Canadian allotments through KAFE’s use of a directional antenna. The Joint Petitioners expressly confirmed that a directional pattern “can be designed that complies with the requirements set forth in the U.S.-Canadian treaty, and affords protection to the Canadian allotments as permitted therein.” *Id.* at p. 12.⁸

⁷ Both Triple Bogey and the Joint Petitioners also noted that KAFE, operating on Channel 281C, would be short-spaced to CHQM-FM, Vancouver, British Columbia. Both also demonstrated that there would be no overlap within Canada between CHQM-FM’s protected contour and the interfering contour of the proposed Channel 281C allotment. Moreover, there would be no overlap in the United States between CHQM-FM’s interfering contour and the protected contour of KAFE operating on Channel 283C. As such, the allotment would comply with the *Working Arrangement*. See Shoreline Proposal at p. 17 & Exhibit A at pp. 11-12; Kent Proposal at p. 11.

⁸ To accommodate operation of KAFE on Channel 281C, the Joint Petitioners proposed modifying the license of KLLM, Forks, Washington to specify operation on Channel 288A instead of Channel 280A. Subsequently, First Broadcasting Investment Partners, LLC, an entity affiliated with FBC, acquired Station KLLM. See BALH-20030903ABW (granted October 24, 2003).

As in their Covington Proposal, the Joint Petitioners' Kent Proposal also sought allotment of new vacant channels at Moro, Oregon; Arlington, Oregon; and Trout Lake, Washington, to cover the unserved and underserved areas that relocation of KMCQ would create.⁹

On the deadline for comments, Mercer Island School District ("Mercer Island"), licensee of Class D Station KMIH(FM), Mercer Island, Washington, and Peninsula School District No. 401 ("Peninsula"), licensee of, *inter alia*, FM Translator K283AH, Gig Harbor, Washington, jointly filed comments in opposition to the reallocation of KMCQ because it would force both KMIH and K283AH off the air. Other opposing comments were filed by Robert Casserd, Chris Goelz, Rod Smith and Gretchen A. Wilbert, as Mayor of Gig Harbor.¹⁰

On August 13, 2002, Triple Bogey filed a Motion to Sever Counterproposal, arguing that the Joint Petitioners' Kent Proposal, as a counterproposal to their own Covington Proposal, should be severed from this proceeding pursuant to the policy set forth in *Taccoa, Georgia* 16 FCC Rcd 21191 (Chief, Allocations Branch, 2001). In *Taccoa*, the Commission expressed concern about the potential for administrative inefficiency and unfairness to parties that could result from allowing the original proponent of a rule making to file a competing counterproposal against itself. *Id.* at 21192 (¶ 5). The filing of a counterproposal by the original proponent makes it necessary for the staff to process two inconsistent proposals from the same party, resulting in "an unnecessary expenditure of staff resources without any offsetting public interest benefit and is not conducive to the efficient

⁹ In addition to the above-referenced counterproposal of New Northwest, Two Hearts Communications, LLC, licensee of Station KHSS, Channel 264C3, Walla Walla, Washington, also filed a counterproposal seeking to upgrade Station KHSS to Class C2 status and reallocate its channel from Walla Walla to College Place, Washington. This counterproposal, which the *Report and Order* denied, is not material to the issues at hand and need not be discussed further in this pleading.

¹⁰ Subsequently, several of these parties also voiced their objection to the Shoreline Proposal because it also would require KMIH and K283AH to cease operation eventually.

transaction of Commission business.” *Id.* The Commission warned that any counterproposal advanced by the original petitioner must contain a satisfactory “explanation, such as unforeseen circumstances, as to why the new proposal could not have been advanced in the initial petition for rulemaking.” *Id.* In the absence of such an explanation, the new proposal would be held for consideration in a separate proceeding.

In this case, Triple Bogey argued that the cursory and internally inconsistent explanation the Joint Petitioners offered as to why the Kent Proposal was not advanced in their initial petition did not withstand examination. Significantly, the timing of the filing of the initial allotment proposal was exclusively within the control of Joint Petitioners. Since there was no regulatory deadline for the submission of their proposal, there was no reason why they could not have waited until Saga’s concerns regarding the Canadian allotment issue were addressed and then filed their petition for rule making. Furthermore, the Joint Petitioners provide no concrete support for their claim that there have been “*changes* with regard to the Canadian channel allotments involved.” In fact, the only “change” was the preparation of a report that Joint Petitioners sent to Canadian authorities on the due date for counterproposals. No action on the report had been taken. In truth, the Joint Petitioners could offer no *bona fide* explanation for their decision not to file the Kent Proposal initially. Triple Bogey argued that under the *Taccoa* policy, the Joint Petitioners’ revised allotment plan should be processed, if at all, in a separate subsequent proceeding. Obviously if Triple Bogey’s Shoreline Proposal were adopted, the Joint Petitioners’ Kent Proposal would not be capable of effectuation and would be dismissed. The Joint Petitioners, in a pleading filed August 28, 2002, opposed Triple Bogey’s motion. Triple Bogey replied September 10, 2002. The staff did not address Triple Bogey’s motion until it issued the *Report and Order*.

The Joint Petitioners and Saga filed Reply Comments on August 13, 2002, arguing that Triple Bogey's Shoreline Proposal should be deemed defective because it contemplated, if necessary, KAFE's use of a directional antenna to protect the Powell River and Bralorne vacant allotments. The Joint Petitioners and Saga based their objection not on any technical impediment to implementation of the Shoreline Proposal but solely on the fact FBC had an "exclusive agreement" with Saga to modify KAFE.

In its Reply Comments filed March 24, 2003, Triple Bogey highlighted that the proposed relocation of KMCQ would mean that no portion of the present KMCQ 60 dBu service area would continue to receive service from the station. More importantly, removal of Channel 283C from The Dalles to the Seattle Urbanized Area would result in the creation of significant white and gray areas¹¹ that would receive replacement service only at some unknown point in the future when, if ever, five vacant allotments, including those the Joint Petitioners proposed for Moro, Arlington and Trout Lake, were filled. Backed by an engineering statement prepared by the firm of Hatfield & Dawson, Triple Bogey pointed out that if KMCQ were relocated to either Kent or Covington, nearly 2,000 persons would lose their only aural service. *See* Exhibit A of Triple Bogey's Reply Comments. An additional 1,836 persons would lose their second aural service. *Id.*

Triple Bogey's Reply Comments pointed to the long-established Commission policies that the public "has a legitimate expectation that existing service will continue" and that replacement of an operating station with a vacant allotment or unconstructed permit "does not adequately cure the disruption to 'existing service' occasioned by the removal of an operating station." *Modification of*

¹¹ A "white" area is an area that receives no full time aural service. A "gray" area is an area that receives only one full time aural service.

FM and TV Authorizations to Specify a New Community of License, 5 FCC Rcd 7094, 7097 (¶ 19) (1990) (hereinafter “*Community of License II*”).

Triple Bogey further argued that its proposal, entailing KAFE’s use of a directional antenna, was not defective, particularly given the Joint Petitioners’ and Saga’s affirmation that a directional antenna can be designed that complies with the requirements of the U.S.-Canada treaty and Saga’s willingness to use such an antenna in connection with the Kent Proposal.

Additionally, Triple Bogey again argued that under *Taccoa, supra*, and a subsequent ruling, *Bridgeton, New Jersey*, 17 FCC Rcd 25,136 (Assistant Chief, Audio Div., 2002), the Kent Proposal should not even have been considered in this proceeding.

On March 12, 2004, the Assistant Chief, Audio Division, released an *Order to Show Cause* (DA 04-607) (hereinafter “*KAFE Show Cause Order*”), directing Saga to show cause why KAFE’s license should not be modified to specify operation on Channel 281C in lieu of Channel 282C at Bellingham. The order noted that the KAFE license could be modified to specify operation on Channel 281C at its current authorized transmitter site if power in the direction of the Powell River and Bralorne allotments were restricted to specified limits. The *KAFE Show Cause Order* further noted that those power restrictions were consistent with the agreement that Saga and the Joint Petitioners reached in connection with the effort to relocate KMCQ to Kent, Washington. The staff ruled that in light of the existence of that prior agreement, (a) Saga and Joint Petitioners must disclose the consideration that Saga is to receive under the agreement, and (b) Triple Bogey must indicate whether it would pay Saga the same consideration to permit the Shoreline allotment.

Triple Bogey responded April 26, 2004, stating that if the consideration specified in the not-yet-disclosed agreement between Saga and the Joint Petitioners was commercially reasonable and if the Commission required Triple Bogey to match such consideration as a pre-condition to adoption of the Shoreline Proposal, Triple Bogey would pay such consideration.

The Joint Petitioners and Saga, however did not comply with the order. Instead they withdrew the Kent Proposal and requested reinstatement of the long-abandoned Covington Proposal.¹²

On June 10, 2004, Triple Bogey moved to dismiss the Covington Proposal on the grounds that it had been abandoned nearly two years before when the Joint Petitioners submitted their Kent Proposal. Triple Bogey urged that the Joint Petitioners' attempted manipulation of the Commission's allotment process should not be tolerated. In essence, Triple Bogey argued, the Joint Petitioners were prosecuting alternative proposals, a practice no longer permitted. *E.g., Quanah, Texas*, 18 FCC Rcd 9495, 9497 (Chief, Audio Div., 2003). The Joint Petitioners filed an opposition on June 23, to which Triple Bogey replied on July 6. Also on July 6, Mercer Island filed comments in support of Triple Bogey's motion.

The *Report and Order*, released on July 9, 2004 (DA 04-2054),¹³ granted the Joint Petitioners' resurrected Covington Proposal, and dismissed Triple Bogey's Shoreline Proposal.

The *Report and Order* also rejected the arguments Mercer Island and Peninsula raised. While recognizing the valuable service KMIH and K283AH provide, the staff affirmed that, as secondary services, neither is protected against interference from primary services, and that if either causes interference to a primary service, the interfering station would be required to suspend operation. The

¹² Saga submitted to the Commission only, with request for confidential treatment, a copy of a Channel Change Agreement between it and Lakeshore Media, LLC and an Assignment and Assumption Agreement and Modification of Channel Change Agreement between Saga, Lakeshore Media, FBC and First Broadcasting Management, LLC. Triple Bogey opposed the request for confidential treatment. To date, the Commission has not acted on Saga's request or Triple Bogey's opposition.

¹³ On May 28, 2004, an initial version of the Report and Order in this proceeding was released (DA 04-1540). But on June 8, 2004, the staff issued an order (DA 04-1647) setting aside the Report and Order.

staff also rejected Mercer Island's proposal to create a special allocation granting KMIH the equivalent of Class A status. *Report and Order* at ¶¶ 5-6.

With respect to the conflict between the Joint Petitioners and Triple Bogey, the *Report and Order* stated that the withdrawal of Saga's consent to KAFE's use of a directional antenna was "fatal" to the Triple Bogey counterproposal. *Id.* at ¶ 20. The staff said it would not require "a licensee to involuntarily relocate its transmitter site [which Triple Bogey did not propose that KAFE do] or install a directional antenna." *Id.* The *Report and Order* stated, without any elaboration, that requiring a station to install a directional antenna "poses unique and significant administrative difficulties for the licensee, the initiating party, and the Commission staff." *Id.*

While briefly discussing the areas and populations that would gain or lose service, the *Report and Order* makes no mention whatsoever of the detailed engineering showing Triple Bogey presented which demonstrates that the relocation of KMCQ would create significant white and gray areas. Indeed, the *Report and Order* does not in any way balance (a) the harm caused by the withdrawal of KMCQ's existing service from underserved rural areas in Oregon and Washington against (b) the marginal benefit of adding yet another reception service to an already well-served area and giving the small community of Covington a local service.

Finally, the staff denied Triple Bogey's motion to dismiss the Joint Petitioners' Covington Proposal. The staff, notwithstanding Triple Bogey's and Mercer Island's arguments, concluded that allowing the Joint Petitioners to return to a proposal abandoned nearly two years before was not fundamentally unfair or prejudicial to other parties.

IV. Discussion

A. Having Abandoned the Covington Proposal in 2002, the Joint Petitioners Should Not Have Been Permitted to Resurrect That Proposal in 2004

To briefly reiterate, on October 29, 2001, the Joint Petitioners filed their proposal to convert Station KMCQ from a Class C station at The Dalles, Oregon, to a Class C3 station at Covington, Washington, *i.e.*, the Covington Proposal. That petition led the Commission to issue the *NPRM*. On the date set for comments and counterproposals, July 29, 2002, the Joint Petitioners dropped the Covington Proposal and submitted a new plan, the Kent Proposal. Over Triple Bogey's vigorous objections, they asserted they were justified in filing a counterproposal to their own initial proposal and that their new proposal was superior to Triple Bogey's. Their prosecution of the Kent Proposal continued for nearly two years until the April 26, 2004, deadline to respond to the *KAFE Show Cause Order*. Rather than comply with that order's directive to disclose the consideration Saga was to receive from FBC for modification of KAFE's facilities, the Joint Petitioners employed a tactic similar to what they used on the counterproposal deadline; they abandoned their current plan (the Kent Proposal) for another (the long-discarded Covington Proposal). The Commission should reject this latest maneuver.

In essence, the Joint Petitioners treated the Covington Proposal and the Kent Proposal as alternatives, between which they could switch at will. But the Commission has made clear it no longer entertains alternative proposals advanced by the same party. *E.g.*, *Quanah, Texas*, 18 FCC Rcd 9495, 9497 (Chief, Audio Div., 2003); *Winslow, Arizona*, 16 FCC Rcd 9551 (Mass Media Bur., 2001).

By filing the Kent Proposal, the Joint Petitioners turned their back once and for all on the Covington proposal. While they stated in their amended proposal that they would apply for the channel at Kent and construct the facility as authorized, no such pledge was made if the channel were

allotted to Covington. That failure to file a timely expression of interest regarding the Covington proposal should have been fatal. *E.g., Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336, ¶ 10 (1988), *recon. denied*, 4 FCC Rcd 3412 (1989), *aff'd. sub nom. Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990); *Butler, Georgia*, 17 FCC Rcd 1653 (Chief, Allocations Branch, 2002); *Cross City, Florida*, 14 FCC Rcd 7772 (Chief, Allocations Branch, 1999).¹⁴ Allowing a party, to the prejudice of other parties, to prosecute an allotment proposal for which it failed to file a timely expression of interest undermines the integrity of the Commission's processes. *Amor Family Broadcasting, supra*, 918 F.2d at 963.

In support of their request to reinstate the Covington proposal, the Joint Petitioners cited *Wickenburg, Arizona*, 17 FCC Rcd 7222 (Assistant Chief, Audio Division, 2002) and *Springfield, Tennessee*, 18 FCC Rcd 25628 (Assistant Chief, Audio Division, 2003). But in each of those cases the counterproposal in question was withdrawn only a short time after being filed and no party opposed the reinstatement of the original proposal.¹⁵ Here, the Joint Petitioners, to avoid compliance with the *KAFE Show Cause Order*, seek to revive their original proposal nearly two years after it was abandoned and over the objection of both Triple Bogey and Mercer Island.

¹⁴ Indeed, the dismissal of a rule making proposal for the failure to file such an expression of interest is routine. *E.g., Milford, Utah*, DA 04-1651, ¶ 11 (Assistant Chief, Audio Div., released June 10, 2004); *Rising Star, Texas*, 18 FCC Rcd 24700 (Assistant Chief, Audio Div. 2003); *Fort Stockton, Texas*, 18 FCC Rcd 11759 (Assistant Chief, Audio Div. 2003); *Clarendon, Texas*, 18 FCC Rcd 12701 (Assistant Chief, Audio Div. 2003); *Elkhart, Kansas*, 18 FCC Rcd 1599, ¶ 1 & n. 2 (Assistant Chief, Audio Div. 2003).

¹⁵ In *Wickenburg*, the counterproposal had not even been placed on public notice by the time it was withdrawn. 17 FCC Rcd at 7222 n. 4. In *Springfield, Tennessee*, both the filing and the withdrawal of the counterproposal were the products of unforeseen circumstances over which the petitioner had no control (*i.e.*, the Commission's adoption of multiple ownership rules that would have precluded the modification requested and the issuance of a stay of those rules by the United States Court of Appeals for the Third Circuit). 18 FCC Rcd at 25628 n.3. Here, the Joint Petitioners have not pointed to any unforeseen circumstances to justify their actions.

The Commission's allotment process is supposed to be taken seriously. Allotment proposals are not intended to be simply game pieces to be acquired and disregarded at will. By filing their initial proposal, the Joint Petitioners indicated an intention to serve as a local transmission outlet for the community of Covington, Washington. On the counterproposal deadline, the Joint Petitioners and Saga elected to pursue instead service to Kent, Washington, as that community's first local station. The amended proposal included a bulky collection of data regarding Kent, all presented in support of the proposition that that community was deserving of a local transmission service.

Now, in a display of unabashed gamesmanship, the Joint Petitioners have abandoned Kent and claim that thereby they are reviving their Covington proposal. Such practices bring discredit to the Commission's allocation process. Condoning the Joint Petitioners flip-flop maneuvers turns the allotment process into an elaborate tableau in which the participants' promises of local service are easily made and easily broken. Having first abandoned their Covington Proposal, and then having abandoned their Kent Proposal, the Joint Petitioners have no valid proposal before the Commission and should be dismissed.

B. Relocation of KMCQ will Create Large "White" and "Gray" Areas

A distance of 179.11 kilometers (111.3 miles) separates the current KMCQ transmitter site and the Joint Petitioners' proposed reference point for the Covington allotment. *See* Joint Petitioners' Covington Proposal, Technical Statement, Figure 1A. No portion of the current KMCQ 60 dBu contour would be served by the proposed Covington station. Such a dramatic move would not necessarily be contrary to the public interest *if* the area losing service (*i.e.*, the entire existing service area of KMCQ) was served by five or more other stations. But that is not the case. The proposed removal of Channel 283C from The Dalles will result in the creation of significant "white"

and “gray” areas that will receive replacement service only at some unknown point in the future, when stations begin operation on a group of two existing and three proposed vacant FM allotments.¹⁶

As Triple Bogey discussed in detail, if KMCQ is relocated as proposed, a population of 1,799 persons – including the entire populations of Arlington and Condon, Oregon – will lose their only aural reception service. See Triple Bogey Reply Comments, filed March 25, 2003, Exhibit A (Engineering Statement of Hatfield & Dawson) at pp. 5-6. Furthermore, a population of 1,836 persons – including the entire population of Maupin, Oregon – would lose one of their two aural reception services.

A bedrock Commission policy in allocation matters is that the public “has a legitimate expectation that existing service will continue.” *Community of License II*, 5 FCC Rcd at 7097 (¶ 19). The United States Court of Appeals for the District of Columbia Circuit has underscored that it is axiomatic that the curtailment of existing service is not in the public interest. *Hall v. FCC*, 237 F.2d 567 (D.C. Cir. 1956); accord, e.g., *West Michigan Television v. FCC*, 460 F.2d 883 (D.C. Cir. 1971); *Television Corp. of Michigan v. FCC*, 294 F.2d 730 (D.C. Cir. 1961).

In considering whether to permit an existing station to change its community of license, the expectation that existing service will continue is a factor that must be weighed “independently against service benefits that may result from reallocating a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both.” *Community of License II*, 5 FCC Rcd at 7097 (¶ 19); accord, e.g., *Avoca, Pennsylvania*, 18 FCC Rcd 19199, 19200 (Assistant Chief, Audio Div., 2003); *Savannah, Georgia*, 18 FCC Rcd

¹⁶ The existing vacant allotments are Channel 228A at Condon, Oregon, and Channel *268C3 at The Dalles, Oregon. The proposed new vacant allotments are Channel 283C1 at Moro, Oregon; Channel 261C2 at Arlington, Oregon, and Channel 226A (now Channel 236A) at Trout Lake, Washington.

17632, 17633 (Assistant Chief, Audio Div., 2003). The Commission has made clear that replacement of an operating station with a vacant allotment, or even an unconstructed permit, does not adequately cure the disruption to existing service occasioned by removal of an operating station. *Community of License II*, 5 FCC Rcd at 7097 (¶ 19). “From the public’s perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station accessed today by simply turning on a TV or radio set.” *Id.* Accordingly, in analyzing a proposal to relocate a station, the Commission made clear it would examine particularly closely the effect of the proposal on existing service to the public. *Id.*

Here, given that the provision of at least one full-time aural service is the highest allotment priority,¹⁷ the withdrawal of the only radio service available to nearly 1,800 people is *prima facie* contrary to the public interest.¹⁸ Previous Commission rulings support that conclusion.

For example, in *Pecos, Texas*, 14 FCC Rcd 2840 (Chief, Allocations Branch, 1999), the Commission rejected a proposal to change the community of license of Station KKLY from Pecos, Texas, to Wink, Texas, even though KKLY had not yet been constructed, because from its authorized Pecos site, KKLY would provide a first service to 673 people and a second service to 20 people. In light of the fact that retaining the channel in Pecos would serve the highest allotment priority, the proposed relocation to Wink was denied.

¹⁷ *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) (“FM Priorities”). The other priorities are: (2) second full-time aural service; (3) first local service, and (4) other public interest factors. Co-equal weight is given to Priorities 2 and 3.

¹⁸ Triple Bogey’s Reply Comments focused on the Joint Petitioners’ Kent Proposal because the Joint Petitioners had abandoned their original Covington Proposal. Importantly, however, the areas and populations that would lose first and second aural service would remain the same regardless of whether KMCQ were removed to Kent or Covington. See Triple Bogey Reply Comments, Exhibit A, at p. 5.

Similarly, in *Cheyenne, Wyoming*, 15 FCC Rcd 7528 (Chief, Allocations Branch 2000), the Commission rejected an allotment plan that would have resulted in 211 people losing a potential first aural service from an authorized but unbuilt station. The Commission found that creation of this white area triggered Priority 1 of *FM Priorities*. For that reason alone, notwithstanding the fact that the proposal would result in a gray area population net gain of 532 people, it was denied. *Id.* at ¶¶ 5&7; accord, *Littlefield, Texas*, 12 FCC Rcd 3215, 3220 (¶9) (Chief, Allocations Branch 2000) (retention of a first aural service to 411 persons buttresses the decision to retain the current allotment arrangement rather than adopt the proposal presented); see *Television Corp. of Michigan, supra* (TV transmitter site move not justified where over 100,000 people would gain Grade A service but 900 people would be deprived of any service and about 42,000 people would lose all but one service).

In light of the fact that the loss of *potential* first aural service to less than 700 people led to denial of reallocation proposals in *Pecos* and *Cheyenne*, the loss of *actual* first aural service to more than twice that number here warrants the denial of Joint Petitioners' proposal for KMCQ.

As noted previously, the Joint Petitioners have proposed three fill-in allotments to cover the loss in area that relocation of KMCQ would create. But the Commission rightly has expressed deep concern regarding the use of new vacant allotments to repair the damage caused by relocation of an existing station. *Community of License II*, 5 FCC Rcd at 7097 (¶ 19); accord *Pacific Broadcasting of Missouri, LLC*, 18 FCC Rcd 2291 (2003), *recon. denied*, FCC 04-140 (released June 16, 2004).

In *Pacific Broadcasting*, the full Commission stopped the staff practice of relying on so-called "back-fill" vacant allotments to preserve local service when a community's only existing station seeks to change its city of license. The Commission held that the back-fill practice permitted the filing of inherently contingent proposals and created the potential for the type of problems and resource burdens that led to the adoption of the general prohibition on the filing of contingent

applications. The Commission stated, “[T]he ultimate licensing of a back-fill through our auction procedures is both an uncertain and time-consuming process.” 18 FCC Rcd at 2295-96 (¶ 14). Accordingly, the Commission ordered the Bureau to cease this practice immediately. *Id.* at 2296 (¶ 15).

While *Pacific Broadcasting* specifically dealt with the preservation of a community’s sole local service, *Community of License II* indicates that the same principle is applicable to situations in which a sole aural reception service is to be “preserved” by fill-in vacant allotments.

If a vacant allotment is an inadequate vehicle to preserve first local service, which is the third allotment priority, it follows that a vacant allotment also is an inadequate vehicle to preserve a population’s only aural reception service, which is the first allotment priority. Obviously, the use of vacant allotments to cover newly created white areas entails the same uncertainty and delay the Commission deemed unacceptable in *Pacific*. For instance, no one can predict with any degree of confidence: (a) when a filing window for a newly added vacant white area allotment will open, particularly given the fact the Commission currently has a backlog of some 500 allotments; (b) how many, if any, applications for the allotment will be filed; (c) whether an auction will have to be conducted, thereby delaying the award of a construction permit, and (d) if a construction permit is awarded, when or whether the station actually will begin operation.

If anything, the now-discredited staff practice of using a back-fill allotment to preserve local service in a community was more limited than the practice the Joint Petitioners advocate to cover white areas that relocation of KMCQ would create. Under the pre-*Pacific* policy, the relocation of a community’s sole local station could be effectuated only when the designated replacement station went on the air. Here, the Joint Petitioners assume a vacant allotment alone (regardless of when, if ever, actual service is initiated) is sufficient to compensate for the removal of a population’s sole

reception service. But quite obviously, the legitimate expectation of 1,799 persons that they will continue to receive *the only radio signal available to them* demands more than a mere hope that some day a replacement service will be forthcoming.

Here, given the significant size and population of the white and gray areas that relocation of KMCQ would create, the public interest dictates that the Joint Petitioners' Covington Proposal be rejected.

C. Under the Particular Circumstances of this Case, the Fact KAFE Might Need to Use a Directional Antenna Should Not Result in Dismissal of Triple Bogey's Superior Allotment Proposal

Assuming *arguendo*, the Joint Petitioners' resurrected Covington Proposal warrants any consideration,¹⁹ Triple Bogey's Shoreline Proposal outstrips the Joint Petitioners' Covington Proposal under FM Priorities 1, 2, 3 and 4:²⁰

Priority 1 – First Aural Service: Triple Bogey's plan would provide a first aural service to 558 persons compared to 58 persons under the Joint Petitioners' plan.²¹

Priority 2 – Second Aural Service: Triple Bogey's plan will result in 1,971 persons receiving a second aural service, compared to 1,362 persons under the Joint Petitioners' plan.

Priority 3 – First Local Service (co-equal with Priority 2): Triple Bogey's plan will provide a first local service to five communities with an aggregate population of 54,849, while the Joint

¹⁹ See pp. 12-14, *supra*.

²⁰ See n. 17, *supra*.

²¹ See Covington Proposal, Engineering Exhibit at p.8 and Figure 10. Triple Bogey's engineers, however, calculated the white area population under the Joint Petitioners' proposal to be 408 persons. See Shoreline Proposal, Exhibit A at p.32. Nonetheless, Triple Bogey's proposal still is to be preferred.

Petitioners would bring a first local service to four communities with an aggregate population of 15,138.²²

Priority 4 – Other Public Interest Factors: Triple Bogey’s plan would result in a net gain population served of 2,370,329 persons, compared to 820,176 under the Joint Petitioners’ plan.

Even if Triple Bogey’s advantages under the first two priorities were ignored, its superiority under Priority 3 clearly could be decisional. When the Commission is faced with a choice between two mutually exclusive proposals involving Priority 3, the tie-breaker is the population of the respective communities of license. *E.g., Cumberland, Kentucky*, 17 FCC Rcd 5024, 5027 (¶ 9) (Chief, Allocations Branch, 2002). A difference as small as 38 persons has been decisive. *Blanchard, Louisiana*, 10 FCC Rcd 9828, 9829 (1995). Here, the difference is more than a thousand times greater.

The *Report and Order* rejected Triple Bogey’s clearly superior allotment plan for a single reason: Saga’s Bellingham Station, KAFE, might have to operate with a directional antenna to protect two vacant Canadian allotments. To briefly reiterate, allotment of Channel 283C2 at Shoreline for use by KDUX-FM complies with all of the Commission’s distance separation requirements, if KAFE switches from Channel 282C to Channel 281C. Using the current KAFE transmitter site, Channel 281C would be fully spaced to all domestic allotments if Station KLLM(FM), Forks, Washington, which currently operates on Channel 280A, switches to another frequency.²³ The KAFE site, however, would be closer to one existing Canadian station and two vacant Canadian allotments than normally contemplated under the *Working Arrangement*. For

²² Of particular importance is that Shoreline’s population as of the 2000 Census is 53,025, compared to Covington’s population of 13,783.

²³ Triple Bogey proposed Channel 240A; the Joint Petitioners proposed Channel 288A. Either would be acceptable.

the reasons detailed in n. 7, *supra*, the existing Canadian station in question, CHQM-FM, Vancouver, British Columbia, presents no obstacle to the adoption of the Shoreline Proposal.

Turning to the two vacant Canadian allotments, the KAFE transmitter site is 170.6 kilometers from the reference point for Channel 280A allotment at Powell River, and 234 kilometers from the reference point for Channel 281A allotment at Bralorne. Under the FCC's domestic spacing rules, the normally required distance between a Class C allotment and a first adjacent Class A allotment is 165 kilometers; between a Class C allotment and a co-channel Class A allotment, it is 226 kilometers. Thus, KAFE operating on Channel 281C would be fully spaced to both the Powell River and Bralorne channels if they were U.S. allotments. But under the *Working Arrangement*, the normal spacing between a Class C allotment and a first adjacent Class A allotment is 182 kilometers; between a Class C allotment and a co-channel Class A allotment, 247 kilometers. Nonetheless, the proposed allotment of Channel 281C at Bellingham can be made if the standard "special negotiated short-spacing" process, established through the *Working Arrangement*, is employed. In this instance, assuming that the Canadian government declines to modify the Bralorne and Powell River allotments, only a slight reduction in radiation toward those communities would be required (3.5 dB toward Powell River and 3.0 dB toward Bralorne).

The reduction of power, whether through the use of a directional antenna or otherwise, to protect Canadian stations and allotments is contemplated by the *Working Arrangement* and a long-standing common practice. *Working Arrangement*, §§ 3.5.2, 3.6 & 5.2.2; *accord, e.g., Raymond, Washington*, 17 FCC Rcd 997, ¶11 & n.9 (Chief, Allocations Branch 2002); *Wellsville, New York*, 14 FCC Rcd 15964, ¶6 (Chief, Allocation Branch 1999); *Hilton, New York*, 11 FCC Rcd 6674 (Chief, Allocations Branch 1996) (Notice of Proposed Rule Making; allotment subsequently adopted); *Brighton, New York*, 8 FCC Rcd 793, ¶6 (Chief, Allocation Branch 1993); *Waterbury*,

Vermont, 6 FCC Rcd 5163, ¶11 (Chief, Policy & Rules Div. 1991); *Saranac Lake, New York*, 6 FCC Rcd 5121, ¶6 (Assistant Chief, Allocation Branch 1991); *see Corinth, New York*, 5 FCC Rcd 3243, ¶ 6 (1990) (negotiating concurrence with the Canadian government regarding a short-spaced allotment is not an “extraordinary procedure”).

Of particular importance in this case is the fact that operating with the directional antenna in question, there would be absolutely no change in the area and population within the United States covered by the KAFE 60 dBu or 70 dBu contours. *See Triple Bogey Shoreline Proposal*, Exhibit A at pp. 16-17. Moreover, there would be no power reduction in the direction of Bellingham, KAFE’s community of license. *Id.* at pp. 17-18. The only areas losing service from KAFE would be in Canada. Under the treaty with Canada, a station located in proximity to the border is entitled to protection only with respect to the land areas in its own country. *See Working Arrangement*, Section 5.2.2.4.

Notwithstanding that the Joint Petitioners and Saga themselves contemplated KAFE’s use of a directional antenna, they strenuously object to KAFE’s use of the same directional antenna to accommodate the Shoreline allotment. Saga argues that it cannot be ordered, absent its consent, to operate with a directional antenna. Of course, Saga provided such consent, albeit it to FBC for compensation under their “exclusive agreement.” *See Saga Reply Comments*, filed August 13, 2002, at pp. 4-5. Saga and the Joint Petitioners, when faced with the requirement that they disclose the compensation that Saga was to receive, chose to abandon the Kent Proposal. *See pp. 12-14, supra.* Significantly, neither the Joint Petitioners nor Saga indicated in the pleadings filed in response to the *KAFE Show Cause Order* that some development rendered use of a directional antenna infeasible. Obviously, the Kent Proposal was withdrawn because FBC was fearful that Triple Bogey would match the consideration FBC had agreed to pay Saga.

In the *Report and Order*, citing *Wasilla, Alaska*, 14 FCC Rcd 6263 (Mass Media Bur. 1999), the staff said it would not require a licensee “to involuntarily relocate its transmitter site or install a directional antenna.” *Report and Order* at ¶ 20. Of course, this case does not involve relocation of an existing transmitter site and the directional antenna case cited, *Wasilla*, is not on point. In *Wasilla*, the Commission’s staff rejected a proposed substitution at Anchorage, Alaska, because it would have required the use of a directional antenna to protect a domestic allotment at Homer, Alaska. The case is unremarkable in that it underscores the well-established principle that domestic allotments must be fully spaced. *Id.* at 6265 (¶ 9); *Amendment of Part 73 of the Commission’s Rules to Remit Short-Spaced FM Assignments by Using Directional Antennas*, 4 FCC Rcd 1681, ¶ 5, (1989) (hereinafter “*Directional Antennas*”).

Neither *Wasilla* nor any other case cited by the Joint Petitioners or Saga involves a Canadian allotment. The Commission frequently has used contour protection methods at the allotment stage with respect to short-spacing to Canadian stations and allotments, as the numerous cases cited on pp. 21-22, *supra*, indicate.

The *Report and Order* recites that requiring a station to install a directional antenna “poses unique and significant administrative difficulties for the licensee, the initiating party, and the Commission’s staff.” *Report and Order* at ¶ 20. The *Report and Order* gives no hint what those administrative difficulties might be. Contrary to the staff’s conclusion, the use of directional antennas presents no particular difficulty. Directional FM antennas are common. The Commission itself recognized 15 years ago that use of directional antennas cannot be considered a novelty in the FM broadcast service. *See Directional Antennas, supra*, at n. 4. Under Section 73.215 of the Commission’s Rules, applicants commonly employ directional antennas to provide contour

protection. Stated simply, the specification of a directional antenna does not entail a unique or significant burden on the Commission or the parties involved.

It must be underscored that this case involves a very narrow set of circumstances. Triple Bogey does not argue that stations should be compelled in all circumstances to use directional antennas in order to the accommodate the allotment proposals of other parties. First, a directional antenna would never be used as a means to cure, at the allotment stage, a domestic short-spacing. *E.g., Wasilla, Alaska, supra*. Second, a U.S. licensee would not be forced to use a directional antenna to protect Canadian allotments if the use of the antenna would reduce the United States land area or population within the station's service contours.

But where a proponent such as Triple Bogey presents a superior allotment proposal, that proposal should not be frustrated simply because an existing station is unwilling to install a garden variety directional antenna to protect Canadian allotments where use of that directional antenna will result in no reduction in the area or population served in the United States – particularly when the station previously consented to use of such an antenna. Here, Triple Bogey urges the Commission to reverse the *Report and Order* and adopt the Triple Bogey proposal.²⁴

²⁴ Of course, Triple Bogey always has made clear that it will shoulder the cost of acquiring and installing the directional antenna to be used by KAFE. Furthermore, Triple Bogey has timely pledged, in accordance with the guidelines set forth in *Circleville, Ohio*, 8 FCC 2d 159 (1967), to pay the other costs the licensees of KAFE and KLLM incur in changing frequency of their respective stations.

V. Conclusion

WHEREFORE, in light of all circumstances present, Triple Bogey respectfully requests that the *Report and Order* in this proceeding be REVERSED, that Triple Bogey's allotment proposal be GRANTED and that the conflicting proposal of the Joint Petitioners be DISMISSED or DENIED.

TRIPLE BOGEY, LLC, MCC RADIO, LLC and
KDUX ACQUISITION, LLC

By: 

Matthew H. McCormick
Their Counsel

Reddy, Begley & McCormick, LLP
1156 15th Street, N.W., Suite 610
Washington, D.C. 20005-1770
(202) 659-5700

August 20, 2004

CERTIFICATE OF SERVICE

I, Janice M. Rosnick, do hereby certify that I have on this 20th day of August, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing APPLICATION FOR REVIEW to the following:

John A. Karousos*
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau, Room 3-A266
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Robert Hayne*
Audio Division
Mass Media Bureau
Federal Communications Commission
Room 3-A262
445 Twelfth Street, SW
Washington, DC 20554

Mark N. Lipp, Esq.
Vinson & Elkins, LLP
1455 Pennsylvania Ave., N.W., Suite 600
Washington, DC 20004
Counsel for FIRST BROADCASTING COMPANY, L.P. and
FIRST BROADCASTING INVESTMENT PARTNERS, LLC

J. Dominic Monahan, Esq.
Luvaas Cobb Richards & Fraser, PC
777 High Street
Suite 300
Eugene, OR 97401
Counsel for MID-COLUMBIA BROADCASTING, INC.

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, PC
5028 Wisconsin Avenue, NW, Suite 301
Washington, DC 20016
Counsel for SAGA BROADCASTING CORP.

M. Anne Swanson, Esq.
Nam E. Kim, Esq.
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
Counsel for NEW NORTHWEST BROADCASTERS, LLC

Dennis J. Kelly, Esq.
Law Office of Dennis J. Kelly
P. O. Box 41177
Washington, DC 20018
Counsel for TWO HEARTS COMMUNICATIONS, LLC

Howard J. Barr, Esq.
Womble Carlyle Sandridge & Rice, PLLC
1401 Eye Street, NW, 7th Floor
Washington, DC 20005
Counsel for MERCER ISLAND SCHOOL DISTRICT and
PENINSULA SCHOOL DISTRICT NO. 401

Cary S. Tepper, Esq.
Booth Freret Imlay & Tepper, PC
7900 Wisconsin Avenue, Suite 304
Bethesda, MD 20814-3628
Counsel for BAY CITIES BUILDING COMPANY, INC.

James P. Riley, Esq.
Fletcher Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
Counsel for SALEM MEDIA OF OREGON, INC.

Charles R. Naftalin, Esq.
Holland & Knight, LLP
2099 Pennsylvania Avenue, NW, Suite 100
Washington, DC 20006-1813
Counsel for McKENZIE RIVER BROADCASTING CO., INC.

Chris Goelz
8836 SE 60th Street
Mercer Island, WA 98040

Robert Casserd
4735 N.E. 4th Street
Renton, WA 98059

Gretchen W. Wilbert
Mayor, City of Gig Harbor
3105 Judson Street
Gig Harbor, WA 98335

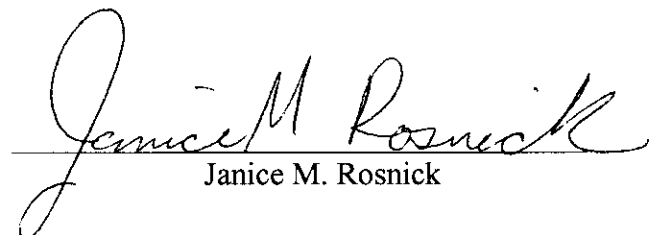
Ron Hughes, President
Westend Radio, LLC
P. O. Box 145
Hermiston, OR 97838

Oregon Eagle, Inc.
P. O. Box 40
Tillamook, OR 97141

Rod Smith
13502 NE 78th Circle
Vancouver, WA 98682-3309

Merle E. Dowd
9105 Fortuna Drive, #8406
Mercer Island, WA 98040

Harry F. Cole, Esq.
Fletcher Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209-3801
Counsel for CRISTA MINISTRIES, INC.



Janice M. Rosnick